



**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-95773; File No. SR-NYSE-2022-41]**

**Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Price List**

September 14, 2022.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on August 31, 2022, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend its Price List to increase the NYSE Crossing Session II monthly per member organization fee cap. The Exchange proposes to implement the fee changes effective September 1, 2022. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

**II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to increase the NYSE Crossing Session II (“CS II”) monthly per member organization fee cap.

The Exchange proposes to implement the fee changes effective September 1, 2022.

Competitive Environment

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>4</sup>

As the Commission itself has recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”<sup>5</sup> Indeed, equity trading is currently dispersed across 16 exchanges,<sup>6</sup> 31 alternative trading systems,<sup>7</sup> and numerous broker-dealer internalizers

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<sup>4</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (Final Rule) (“Regulation NMS”).

<sup>5</sup> See Securities Exchange Act Release No. 51808, 84FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Transaction Fee Pilot for NMS Stocks Final Rule) (“Transaction Fee Pilot”).

<sup>6</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/). See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

<sup>7</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is *available at* <https://www.sec.gov/foia/docs/atlist.htm>.

and wholesalers. Based on publicly-available information, no single exchange has more than 20% of the market.<sup>8</sup> Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange's share of executed volume of equity trades in Tapes A, B and C securities is less than 12%.<sup>9</sup>

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. With respect to non-marketable order flow that would provide displayed liquidity on an Exchange, member organizations can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

To respond to this competitive environment, the Exchange has established incentives for its member organizations to utilize the Exchange's after-hours crossing session.<sup>10</sup> The proposed fee change is designed to revise the incentives for CS II in order to facilitate after-hours trading following the decommissioning of the Exchange's affiliates' after-hours facility, as described below.

#### Proposed Rule Change

Currently, the Exchange charges a fee of \$0.0004 per share (both sides) for executions in CS II.<sup>11</sup> Fees for executions in CS II are capped at \$200,000 per month per member organization.

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<sup>8</sup> See Cboe Global Markets U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

<sup>9</sup> See id.

<sup>10</sup> CS II runs on the Exchange from 4 p.m. to 6:30 p.m. eastern time and handles member organization crosses of baskets of securities of aggregate-priced buy and sell orders. See NYSE Rule 7.39.

<sup>11</sup> See note 10, supra.

The Exchange proposes to increase the monthly cap per member organization to \$300,000. The \$0.0004 per share fee for executions in CS II would remain unchanged and would be subject to the proposed \$300,000 per month per member organization cap.

The Exchange proposed increasing the cap to reflect the decommissioning of the off-hours facility offered by the Exchange's affiliate NYSE American LLC ("NYSE American"), effective September 1, 2022.<sup>12</sup> The Exchange recently filed to adopt a new Rule 7.39 governing its off-hours trading facility based on NYSE American Rule 7.39E that would permit Exchange member organizations to enter aggregate-price coupled orders for securities, including UTP securities, listed and traded on NYSE.<sup>13</sup> With the decommissioning of the NYSE American facility, the Exchange anticipates that the NYSE American ETP Holders that utilize the NYSE American off-hours facility, all of whom are also NYSE member organizations, would be in a position to transition to CS II. The NYSE American off-hours facility was subject to a \$100,000 cap per month, equivalent to the proposed increase. No member organization qualifies for the Exchange's current fee cap. The Exchange further notes that it does not know how much order flow member organizations choose to route to off-exchange venues in the after-hours market.<sup>14</sup>

The proposed changes are not otherwise intended to address other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of

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<sup>12</sup> See Securities Exchange Act Release No. 95499 (August 12, 2022), 87 FR 50894 (August 18, 2022) (SR-NYSEAMER-2022-35) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delete Current Rule 7.39E).

<sup>13</sup> See Securities Exchange Act Release No. 95498 (August 12, 2022), 87 FR 50906 (August 18, 2022) (SR-NYSE-2022-37) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a New Rule 7.39 and Delete Current Rules 900-907).

<sup>14</sup> The Exchange also proposes the non-substantive correction of inserting a missing parenthesis following "member organization."

the Act,<sup>15</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>16</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

#### The Proposed Change is Reasonable

As discussed above, the Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>17</sup> While Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”<sup>18</sup>

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products, in response to fee changes, including with respect to after-hours crossing sessions. Accordingly, competitive forces constrain exchange transaction

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<sup>15</sup> 15 U.S.C. 78f(b).

<sup>16</sup> 15 U.S.C. 78f(b)(4) & (5).

<sup>17</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (Final Rule) (“Regulation NMS”).

<sup>18</sup> See Securities Exchange Act Release No. 75793 (August 32, 2015), 80 FR 53600 (September 04, 2015) (SR-NYSE-2015-37) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Price List to Raise the NYSE Crossing Session II Fee Cap).

fees that relate to after-hours crossing orders. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

Given this competitive environment, the proposal represents a reasonable attempt to maintain a cap for member organizations that are particularly active during CS II in view of the decommissioning of the after-hours session on the Exchange's affiliate NYSE American. The Exchange anticipates that member organization volume that would have participated on NYSE American's after-hours session could migrate to CS II, and the proposal represents a reasonable attempt to encompass an increase in volume by particularly active member organizations. As noted above, the fee subject to the cap would remain unchanged. The Exchange notes that the last time this cap was changed was 2015.<sup>19</sup>

#### The Proposal is an Equitable Allocation of Fees

The Exchange believes the proposal equitably allocates its fees among its market participants. The Exchange is not proposing to adjust the fee for executions in CS II, which will remain at the current level for all market participants. Rather, by capping executions for all member organizations in CS II at an adjusted level that reflects the decommissioning of the NYSE American after-hours session and the anticipated migration of volume from NYSE American to the NYSE, the proposal would encourage member organizations to send additional orders to the Exchange's after-hours trading session. The Exchange notes that the proposed cap of \$300,000 reflects the combination of the current NYSE cap of \$200,000 and the current NYSE American cap of \$100,000. As noted, the same member organizations that participate in CS II participated in the NYSE American after-hours session, and the Exchange anticipates that these member organizations will send additional volume to CS II, which can accept aggregate-price coupled orders for securities, including UTP securities, listed and traded on NYSE,

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<sup>19</sup> See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

following the decommissioning of the NYSE American after-hours facility.<sup>20</sup> As proposed, all similarly situated member organizations will be subject to the same fee structure to participate in CS II and access to the Exchange's market will continue to be offered on fair and non-discriminatory terms.

#### The Proposal is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, member organizations are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The Exchange believes that the proposed increase in the monthly fee cap for CS II transactions is not unfairly discriminatory because the proposal would be provided on an equal basis to all member organizations that choose to utilize the after-hours facility, who would all be eligible for the proposed cap on an equal basis. The proposal neither targets nor will it have a disparate impact on any particular category of market participant. The proposal does not permit unfair discrimination because the higher cap would be applied to all similarly situated member organizations, who would all be eligible for the same cap on an equal basis. Accordingly, no member organization already operating on the Exchange would be disadvantaged by this allocation of fees. Further, as noted, the Exchange believes the proposal would provide an incentive for member organizations to send additional orders to CS II following the decommissioning of the NYSE American after-hours facility, which would benefit member organizations that would only need to send after-hours orders to a single facility for all tapes.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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<sup>20</sup> See Rule 7.39.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,<sup>21</sup> the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the increase in the fee cap for member organizations that are particularly active in CS II would not burden competition because it would apply to all member organizations on equal, fair and non-discriminatory terms. In addition, as noted, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to the Exchange's after-hours facility following the decommissioning of NYSE American's after-hours facility. The Exchange anticipates that member organizations will send additional volume to CS II, which can accept aggregate-price coupled orders for securities, including UTP securities, listed and traded on NYSE. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>22</sup>

*Intramarket Competition.* The proposed change is designed to attract additional order flow to the Exchange. The Exchange believes that the proposed change would continue to incentivize market participants to direct after-hours order flow to the Exchange. Greater two-sided liquidity in the after-hours trading session benefits all market participants. The current credit and the proposed cap would continue to be available to all similarly-situated market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange. As noted, the proposal would apply to all similarly situated member organizations on the same and equal terms, who would benefit from the change on the same basis. Accordingly, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

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<sup>21</sup> 15 U.S.C. 78f(b)(8).

<sup>22</sup> Regulation NMS, 70 FR at 37498-99.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer after-hours trading sessions and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>23</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>24</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the

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<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>24</sup> 17 CFR 240.19b-4(f)(2).

Commission shall institute proceedings under Section 19(b)(2)(B)<sup>25</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2022-41 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2022-41. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office

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<sup>25</sup> 15 U.S.C. 78s(b)(2)(B).

of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2022-41, and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

[FR Doc. 2022-20267 Filed: 9/19/2022 8:45 am; Publication Date: 9/20/2022]

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<sup>26</sup> 17 CFR 200.30-3(a)(12).